Supreme Court, U.S.
FILED
AUG 24 1993
OFFICE OF THE CLERK

No. 93-161

In The

Supreme Court of the United States

October Term, 1993

AMERICOM DISTRIBUTING CORPORATION,

Petitioner,

v.

ACS COMMUNICATIONS, INC.,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL R. COOPER
Counsel of Record
DOOLEY & RUCKER, P.C.
3300 Oak Lawn Avenue
Suite 602
Dallas, TX 75219
(214) 443-0000
TELEFAX: (214) 443-0313

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Did the United States District Court and the United States Court of Appeals err in requiring a showing of predatory pricing in order to make a valid claim under Sec. 2(a) of the Clayton Act as amended by the Robinson Patman Act (15 U.S.C. § 13(a))?

2. Did the United States District Court and the United States Court of Appeals correctly rule that the Appellee, ACS Communications, Inc., established a valid defense to the Appellant, Americom Distributing Corporation, Inc.'s Clayton Act claim by showing the price differentials charged to different distributors for its headsets made only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . . ?

PARTIES TO PROCEEDING

The Petitioner, Americom Distributing Corporation, Inc., a Texas corporation, was the Plaintiff and Appellant below.

The Respondent, ACS Communications, Inc., a California corporation, was the Defendant and Appellee below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO PROCEEDING..... ii

TABLE OF CONTENTS..... iii

OPINIONS AND JUDGMENTS BELOW 1

JURISDICTION..... 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1

STATEMENT OF THE CASE..... 1

SUMMARY OF REASONS FOR DENYING THE WRIT 4

ARGUMENT AND AUTHORITIES SUPPORTING REASONS FOR DENYING THE WRIT..... 5

I. THE UNITED STATES COURT OF APPEALS CORRECTLY RULED THAT IN ORDER TO SHOW A VALID CLAIM UNDER SEC. 2(a) OF THE CLAYTON ACT, AS AMENDED BY THE ROBINSON PATMAN ACT (15 U.S.C. §13(A) IT WAS INCUMBENT UPON AMERICOM TO SHOW PREDATORY PRICING..... 5

II. THE UNITED STATES DISTRICT COURT AND THE UNITED STATES COURT OF APPEALS CORRECTLY HELD THAT ACS ESTABLISHED A VALID DEFENSE TO ITS DIFFERENTIAL IN PRICING UNDER SEC. 2(a) OF THE CLAYTON ACT IN THAT THE EVIDENCE ESTABLISHED SUCH PRICE DIFFERENTIALS ONLY MADE DUE ALLOWANCE FOR DIFFERENCES IN THE COST OF MANUFACTURE, SALE OR DELIVERY RESULTING FROM THE DIFFERING METHODS OR QUANTITIES IN WHICH SUCH COMMODITIES WERE SOLD TO PURCHASERS 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES:

American Can Co. v. Bruce's Juices, Inc., 187 F.2d 919 (5th Cir. 1951) 8

American Motors Corporation v. FTC, 384 F.2d 247 (6th Cir. 1967) 8

Americom Distributing Corp. v. ACS Communications, Inc., 990 F.2d 223 (5th Cir. 1993) 1

Falls City Industries, Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 435-436, 103 S. Ct. 1281, 1288, 1289, 75 L. Ed. 2d 174 (1983) 6

FTC v. Morton Salt Co., 334 U.S. 37, 68 S. Ct. 822, 92 L. Ed. 1196 (1948) 5, 6

International Air Industries, Inc. v. American Excelsior Co., 517 F. 2d 714 (5th Cir. 1975) 5

Rose Confections, Inc. v. Ambrosia Chocolate Co., 816 F.2d 381 (8th Cir. 1987) 8

Stitz Sparkk Plug Co. v. Champion Spark Plug Co., 480 F.2d 1253 (5th Cir. 1988) 5

STATUTES AND RULES:

15 *U.S.C.* § 13(a) 1, 2, 5, 7

15 *U.S.C.* § 15 1

28 *U.S.C.* § 1254 1

28 *U.S.C.* § 1291 1

OPINIONS AND JUDGMENTS BELOW

Americom Distributing Corporation v. ACS Communications, Inc., 990 F.2d 223 (5th Cir. 1993), petition for cert. filed. (See Appendix to Petition for Writ of Certiorari)

American Distributing Corporation v. ACS Communications, Inc., No. 4-88-2918OK (N.D. Tex. June 26, 1992). (See Appendix to Petition for Writ of Certiorari)

JURISDICTION

The United States District Court had original jurisdiction over the matter pursuant to 15 U.S.C. § 15. The Court of Appeals exercised its appellate jurisdiction as of right pursuant to 28 U.S.C. § 1291. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Section 2(a) of the Clayton Act as amended by the Robinson Patman Act (15 U.S.C. § 13(a). *See* Appendix to Petition for Writ of Certiorari

STATEMENT OF THE CASE

Respondent, ACS Communications, Inc., a California corporation ("ACS") is a manufacturer of headsets used in the telecommunication business. In 1986, ACS sold its headsets through various distributors throughout the

United States and in the State of Texas. Petitioner, Americom Distributing Corporation, a Texas corporation ("Americom"), was one of ACS' distributors of headsets.

In June, 1986, ACS entered into a new distributorship arrangement with FirstCom, Inc., a Texas corporation ("FirstCom"). Based upon sales forecast provided by FirstCom as well as other supporting and financial information relevant to FirstCom's sales, which led ACS to reasonably conclude that FirstCom could achieve that level of sales which would qualify it for large distributor pricing (Finding of Fact No. 19), ACS agreed to sell certain of its headsets to FirstCom at large distributor pricing. Such price was less than the price ACS sold its headsets to smaller volume distributors. The difference between the price afforded to small volume distributors and large volume distributors was not an arbitrary distinction or categorization, but rather was based upon differing manufacturing and shipping costs that experience and studies had shown ACS were incurred in the manufacturing and shipping process. Such price differentials made only due allowances for difference in the cost to manufacture, sale or delivery resulting from the different methods or quantities in which such commodities were sold to various distributors.

It was the position of Americom that such price differentials constituted a violation of Sec. 2(a) of the Clayton Act as amended by the Robinson Patman Act (15 U.S.C. § 13(a)). It was the contention of ACS that its price differentials were justified by the provisions of Sec. 2(a) of the Clayton Act and that such differentials gave only due allowance for differences in the costs of manufacture,

sale or delivery resulting from the different methods or quantities in which its headsets were sold.

The case was tried in the United States District Court for the Northern District of Texas commencing on March 30, 1992, and Concluding on April 2, 1992. On June 26, 1992, the District Court entered its Judgment, Findings of Fact and Conclusions of Law and held that the Plaintiff take nothing by its suit. Specifically, with respect to Americom's claims under Sec. 2(a) of the Clayton Act, the District Court found that ACS offered large distributor pricing to FirstCom based upon FirstCom's sales forecast, and supporting financial information which led it to believe FirstCom could achieve the volumes necessary for large distributor pricing. The difference between small distributor pricing and large distributor pricing resulted from differing manufacturing and shipping costs (Findings of Fact No. 19). The court further found that such pricing was justified in that such differences made only due allowance for differences in the cost of manufacture, sales or delivery resulting from different methods or quantities in which the products were sold (Finding of Fact No. 22). The District Court further found that such price differential was not a proximate cause of damage to Americom, but that its damages, if any, resulted from weak financial position and ineffective management. (Finding of Fact No. 24).

Based upon its fact findings the District Court concluded ACS' lower price to FirstCom was the result of a standard cost adjustment offered to all distributors expected to sell large volumes of merchandise that decreased ACS's production and delivery cost. It further concluded that ACS's pricing was not predatory and that

Americom had failed to introduce any evidence or proof that the price differential was an attempt to reduce competition within the meaning of the Act. [Conclusions of Law 9 through 13].

Based upon its findings and conclusions of law the Court entered a take nothing judgment in favor of ACS.

The Court of Appeals affirmed the judgment of the District Court finding no evidence of predatory pricing and that the price differential was justified by the evidence.

SUMMARY OF REASONS FOR DENYING THE WRIT

1. Petitioner's request for a writ of certiorari should be denied because the Fifth Circuit followed sound established precedent in requiring the showing of injury to competition evidenced by predatory pricing in order to establish a claim under Sec. 2(a) of the Clayton Act.

2. Petitioner's request for a writ of certiorari should be denied because ACS established a valid defense to its differential pricing under Sec. 2(a) of the Clayton Act in that the evidence and the findings of the trial court established that its price differentials made only due allowance for differences in the cost to manufacture, sale or delivery resulting from the different methods or quantities in which its headsets were sold to distributors.

ARGUMENT AND AUTHORITIES SUPPORTING REASONS FOR DENYING THE WRIT

I.

THE UNITED STATES COURT OF APPEALS CORRECTLY RULED THAT IN ORDER TO SHOW A VALID CLAIM UNDER SEC. 2(a) OF THE CLAYTON ACT, AS AMENDED BY THE ROBINSON PATMAN ACT (15 U.S.C. § 13(a) IT WAS INCUMBENT UPON AMERICOM TO SHOW PREDATORY PRICING.

The Fifth Circuit Court of Appeals and the District Court were correct in requiring a showing of predatory pricing in order to make a case under Section 2(a) of the Clayton Act. It has long been held that in order to make a Clayton Act claim one must show a substantial effect on competition, not merely upon the competitors. *International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714, 721-23 (5th Cir. 1975). In order to show damage to competition as opposed to simply damage to a competitor, it is incumbent upon the Plaintiff in a Clayton Act Case to show "predatory behavior, i.e. the Defendant sacrificed present revenues for the purpose of driving a plaintiff out of the market." *Stitz Spark Plug Co. v. Champion Spark Plug Co.*, 480 F.2d 1253, 1256-57 (5th Cir. 1988).

Americom's reliance upon *FTC v. Morton Salt Co.*, 334 U.S. 37, 68 S. Ct. 822, 92 L. Ed. 2d 1196 (1943) is misplaced. Under *Morton Salt* in order to have an inference of injury to competition, it is necessary to show that a manufacturer sells goods *over time* to some customers at a *substantially lower price* than to competitors of those customers (emphasis supplied). There is simply no evidence in the case before the Court that the price at which ACS sold certain of its headsets to FirstCom was substantially

lower than what it sold said headsets to Americom. The evidence further establishes that such sales occurred over a very limited period of time. (*See* Findings of Fact No's 19 and 22 and Conclusion of Law 13). Although it is true under *Morton Salt* that where it is found that a manufacturer sells goods at a substantially lower price over time, and "such differentials resulted in price differentials between competing purchasers sufficient in amount to influence their resale price" there can be a presumption of injury to competition.

First, there was no evidence in the case before the court that the price differentials in this case were sufficient to influence the resale price of the headsets by Americom to its potential customers. In fact, the evidence with respect to one of its major customers, United Services Automobile Association, was to the contrary that it did not affect the resale price of headsets sold or quoted to United Services Automobile Association by Americom.

Further, such presumption is a rebuttable presumption. See *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435-436, 103 S. Ct. 1282, 1288, 1289, 75 L. Ed. 2d 174 (1983). The fact findings by the Court in this case (Finding of Fact No. 24) clearly rebutted the presumption in this case in that the Court found that the differential in prices in this case was not a proximate cause of any damages to Americom. Rather, Americom's damages, if any, resulted from its weak financial position and ineffective management.

II.

THE UNITED STATES DISTRICT COURT AND THE UNITED STATES COURT OF APPEALS CORRECTLY HELD THAT ACS ESTABLISHED A VALID DEFENSE TO ITS DIFFERENTIAL IN PRICING UNDER SEC. 2 (a) OF THE CLAYTON ACT IN THAT THE EVIDENCE ESTABLISHED SUCH PRICE DIFFERENTIALS ONLY MADE DUE ALLOWANCE FOR DIFFERENCES IN THE COST OF MANUFACTURE, SALE OR DELIVERY RESULTING FROM THE DIFFERING METHODS OR QUANTITIES IN WHICH SUCH COMMODITIES WERE SOLD TO PURCHASERS.

Sec. 2(a) of the Clayton Antitrust Act as amended by the Robinson Patman Act (15 U.S.C. § 13(a)) provides in relevant part as follows:

> . . . provided that nothing herein contained shall prevent differentials which make only due allowance in the costs to manufacture, sell or deliver resulting from the differing methods or quantities which commodities are to such purchasers sold or delivered.

Findings of Fact No's. 19 through 22 and Conclusion of Law No. 13 clearly established that the differentials in price that ACS sold its products to FirstCom as opposed to Americom for, only made due allowance for differences in the cost of manufacturing, sale or delivery resulting from differing methods of quantities in which such headsets were sold.

The testimony of Phil Gattey, a Vice President of ACS, clearly explained the reason for the large distributor vs. small distributor pricing and established it was not an arbitrary division but that such differentials in pricing were based solely upon the cost differences incurred in

the manufacturing and handling of small volume sales vs. large volume sales. The testimony of Al Butcher, the President and Chief Executive Officer of ACS, clearly showed through exhibits admitted into evidence the price differentials which were incurred in shipping, handling and inventory stocking in handling large distributors vs. small distributors. Such cost differentials were shown to equal the price differentials that were charged to First-Com as opposed to Americom in the sale of certain of ACS' headsets.

The type of testimony and evidence introduced in the case at bar was similar to that produced in *American Motors Corporation v. FTC*, 384 F.2d 247 (6th Cir. 1967).

American's claims in its petition that the difference in price for certain of ACS headsets charged to FirstCom as opposed to Americom was based upon creditor considerations is completely without factual basis. The testimony and evidence with respect to the price differentials that was introduced at trial had solely to do with the difference in the cost of manufacturing, stocking and shipping incurred in shipping the large volume distributors vs. small volume. Further, Americom's reliance on *American Can Co. v. Bruce's Juices, Inc.*, 187 F.2d 919 (5th Cir. 1951) is clearly misstated. It is clear that the division made by ACS between large volume pricing and small volume pricing was not an arbitrary division but was made upon studies and costs incurred in the difference in costs to manufacture and ship products on a large volume basis vs. a small volume basis. *Rose Confections v. Ambrosia Chocolate Co.*, 816 F.2d 381 (8th Cir. 1987) simply does not support the proposition that petitioner quotes it for.

CONCLUSION

ACS requests that the petition for writ of certiorari be denied.

Respectfully submitted,

MICHAEL R. COOPER
Counsel of Record

DOOLEY & RUCKER, P.C.
3300 Oak Lawn Avenue
Suite 602, LB-45
Dallas, TX 75219
(214) 443-0000
(214) 443-0313 (FAX)

Attorneys for Respondent